ESTATE OF SAM POOENGERAH	: Order Affirming Decision
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	: Docket No. IBIA 94-101
	:
	: June 29, 1995

Appellants Wilford Neaman, Christine Wildcat, Christina Archuletta, Flora Pooengerah, and Lebyron Martin seek review of a March 9, 1994, order denying rehearing issued by Administrative Law Judge Harvey C. Sweitzer in the estate of Sam Pooengerah (decedent), IP RC 090Z 91. Denial of rehearing let stand a March 9, 1993, order approving decedent's will issued by Administrative Law Judge Ramon M. Child. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the denial of rehearing.

Decedent, Shoshone-Bannock Allottee 180-A0001469, died on May 15, 1990. Administrative Law Judge Keith L. Burrowes held a hearing to probate decedent's trust or restricted estate on June 14, 1991. Evidence presented at the hearing showed that decedent was married twice; that both of his wives predeceased him; that he had only one child, who died as an infant; that he had seven siblings, all of whom predeceased him; and that he was survived by several nieces and nephews, numerous grandnieces and grandnephews, and two step great-grandchildren. Except for Lebyron Martin, appellants are decedent's nieces and nephews.

A will dated February 28, 1990, was introduced at the hearing. In that will decedent devised his entire estate equally to Lynn Tindore, his step great-grandson, and Darcey Martin, his step great-granddaughter. The will stated that "no other person shall inherit or take any of my property," and revoked all prior wills, specifically mentioning an April 10, 1974, will. 1/ When several of decedent's relatives stated that they intended to contest the will, Judge Burrowes continued the hearing to a time and place to be announced later so that a full hearing could be held on the will contest.

Judge Child held the second hearing on February 24-25, 1993. 2/ Testimony at this hearing concentrated on the will contest. The will scrivener was John Ross, who had been an attorney for the Shoshone-Bannock Tribes for almost 11 years. Ross stated that he did not speak Shoshone, and decedent spoke only a little English. He testified that because he was concerned that decedent might have been unduly influenced, he made inquiries about decedent's personal circumstances at the Bureau of Indian Affairs (BIA) Agency. Ross testified that, based on BIA's responses, he believed a will

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1/ Although not part of the record before the Board, the 1974 will was described at the hearing by the scrivener of the 1990 will as leaving most of decedent's estate to Tindore, with two allotments passing to Neaman.

2/ This hearing was originally scheduled for Feb. 22, 1993, but was continued when the parties were unable to reach the hearing site because of severe winter weather in the area.

contest was likely, and he therefore took special precautions to assure himself that appellant was acting under his own volition, including visiting decedent in his home on several occasions over a 20-day period. Ross stated that he personally selected the two individuals who witnessed the will, based on his experience with them while he was a tribal attorney and his belief in their integrity.

One of the will witnesses, Lillian Vallely, a BIA employee who spoke fluent Shoshone, testified at the hearing. The second witness, Florence Wheeler, who was also a BIA employee, was less fluent in Shoshone. Wheeler was unable to attend the hearing because of medical problems and being snowbound. Grace Bitt, who was present at the will execution as an interpreter for decedent, was also unable to attend the hearing because of medical problems. Vernon Martin, the father of Darcey Martin, testified concerning Darcey's relationship to decedent. 3/ Roanna Stump, a health care nurse who had cared for decedent from 1979 until close to the time of his death, testified for the will contestants about decedent's physical condition.

On the first day of the hearing, Ross stated that the will execution sessions were audio-tape recorded. He testified that Bitt had taken custody of the tapes after the will was executed. The advocate for the devisees stated that he had obtained the tapes the weekend before the hearing, but did not have them with him. Judge Child asked him to have the tapes available for the second day of the hearing. During a recess on the second day, the will contestants and their counsel were given an opportunity to listen to the tapes. Judge Child stated that he would not listen to the tapes because they were meaningless without a Shoshone interpreter. After listening to the tapes with his clients, counsel for the will contestants stated that the only comment he had concerning the tapes was that decedent spoke forcefully throughout. The tapes were apparently left in the custody of the advocate for the devisees.

3/ Appellants have consistently argued that neither Tindore nor Darcey Martin is related to decedent by blood, citing this as proof of the "unnaturalness" of the testamentary scheme in decedent's 1990 will. Assuming that devises to persons other than blood relatives are "unnatural," in making this argument, appellants focus only on the fact that Tindore and Darcey Martin are both natural great-grandchildren of decedent's second wife. Vernon Martin testified at the 1993 hearing that Darcey Martin is his daughter, and that he is Wildcat's son. This relationship makes Vernon Martin decedent's grandnephew, and Darcey Martin decedent's great grandniece. In her affidavit in support of the petition for rehearing, Wildcat admits: "[Decedent] is my mother's brother. Darcey Martin is my Son's daughter (Vernon Martin)."

Although the record is not as clear on the relationship between decedent and Tindore, it appears that Tindore was also similarly related to decedent by blood.

The Board notes that one of the main reasons for executing a will is to alter the "usual" disposition of property. From the evidence in this case, decedent twice used a will for that purpose, and twice divided his estate between two individuals, thereby cutting out numerous other collateral relatives.

On March 9, 1993, Judge Child issued an order approving decedent's will.

Neaman, Wildcat, Archuletta, Pooengerah, and Sevina Farmer petitioned for rehearing. They alleged that the recordings of the will execution sessions showed that decedent was subjected to undue influence and duress by the interpreters. They argued that they did not have adequate notice of the existence of the tapes or sufficient time at the hearing to review them. The petition was supported by an affidavit from Lebyron Martin, who was described as "a recognized interpreter on the Fort Hall Indian Reservation," and who stated that the interpreters did not properly interpret decedent's statements to the scrivener. 4/ A brief in support of the petition was accompanied by additional affidavits from family members, essentially making the same allegation.

The petition for rehearing was considered by Judge Sweitzer, who denied rehearing on March 9, 1994. This appeal followed.

The notice of appeal to the Board was unsigned and filed pro sese. It was accompanied by affidavits from Neaman, Wildcat, Pooengerah, Archuletta, and Lebyron Martin. In its May 9, 1994, predocketing notice, the Board ordered the appellants to identify themselves, noting that it appeared Martin might lack standing. In a letter received by the Board on May 27, 1994, the appellants were identified as Neaman, Wildcat, Pooengerah, Archuletta, and Martin. Appellants' attorney also states in the opening brief that these are the appellants.

Lebyron Martin is not listed on decedent's family history, and the Board has found no information identifying him as a relative of decedent. Because there is no information before it that Lebyron Martin is either a devisee or a presumptive heir of decedent, the Board concludes that Martin has failed to show that he has standing to appeal from the denial of rehearing. 43 CFR 4.201(i); Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216, 218 (1987). Therefore, Martin is dismissed as an appellant. This appeal will proceed with the remaining appellants.

The Board has frequently stated that the person challenging a denial of rehearing bears the burden of showing error in that decision. See, e.g., Estate of Grace American Horse Tallbird, 26 IBIA 87, 88 (1994), and cases cited therein. Appellants attempt to show that rehearing should have been granted (1) so that they could present their newly discovered evidence consisting of the contents of the tape recordings of the will execution sessions, (2) because Judge Child was biased against them and denied them the opportunity to testify and to present all of their evidence, and (3) because they were represented at the hearing by incompetent counsel.

Appellants first seek rehearing so that they can present "newly discovered" evidence that was allegedly not available to them before or during

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4/ It appears likely that Lebyron Martin is the person identified as "Lee Byron" on the list of appearances for the hearing.

the hearing. 5/ This evidence consists of appellants' interpretation of the tape recordings of the will execution sessions. Appellants assert that they were unaware of the existence of the tapes prior to the 1993 hearing, and that references to the tapes, and their eventual production at the hearing, came as a surprise. They contend, however, that Judge Child allowed them only 10-15 minutes to review the tapes, and that that amount of time was insufficient for them to comprehend what was happening when the will was being executed. They argue that they were unable to review the tapes fully until after the conclusion of the hearing. Part of this argument may also relate to whether the individuals listening to the tapes at the hearing could understand Shoshone.

The transcript of the 1993 hearing does not support appellants' allegation that Judge Child limited their time for reviewing the tapes. The transcript shows that the Judge proposed taking a 20-minute recess to allow the will contestants and their counsel to review the tapes based upon testimony that the will execution sessions were approximately that long (Tr. at 118, 120). However, the actual recess extended from about 4:20 pm until 5:13 pm (Tr. at 120). There is nothing in the transcript indicating that the Judge controlled the length of the recess or that the hearing resumed for any reason other than that the will contestants were ready to proceed. Based upon the transcript of the hearing, the Board concludes that the will contestants were given as much time as they desired to review the tapes of the will execution sessions.

The transcript also shows that all appellants were present at the hearing. The affidavits submitted by each of the appellants in support of their petition for rehearing indicate that each appellant speaks Shoshone. There is nothing in the transcript showing that the number or identity of persons reviewing the tapes was limited in any way. Based on the evidence in the record, the Board concludes that all appellants had the opportunity to review the tapes at the hearing, and that all appellants speak Shoshone. The only comment about the content of the tapes offered at the hearing on behalf of the will contestants was that decedent spoke in a forceful voice throughout.

Under these circumstances, the Board holds that the evidence appellants now wish to present could and should have been presented during the hearing. Therefore, rehearing was properly denied as it relates to appellants' "newly discovered" evidence. 6/

5/ 43 CFR 4.241(a) allows the filing of petitions for rehearing. It states in pertinent part:

"If the petition is based upon newly-discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision."

6/ The Board would normally consider tape recordings of the execution of a will to be strong evidence of what actually transpired, even if the recordings needed to be interpreted by a disinterested person or persons. However, for the primary reason that there is no proof here as to either the pre- or post-hearing chain of custody of the tapes, the Board concludes that these

Appellants' allegations concerning bias by Judge Child and incompetent representation by their attorney are closely interconnected. They first allege that Judge Child restricted their right to testify. The hearing transcript shows that Judge Child did not restrict the right of any individual to testify. Instead, it shows that the attorney for the will contestants decided not to call any additional witnesses (Tr. at 110, 114, 128, 131). The Board rejects appellants' contention that Judge Child prevented them from testifying.

Appellants also allege that a health care nurse was available at the hearing but was not allowed to testify. In his affidavit in support of the petition for rehearing, Lebyron Martin identifies this individual as Roanna Stump. As noted above, Stump testified for the will contestants about decedent's physical condition around the time of the will execution (Tr. at 86-109). She specifically stated, however, that she had no opinion as to decedent's mental condition when the will was executed (Tr. at 103). The Board finds that appellants' health care witness did in fact testify at the 1993 hearing.

The hearing transcript gives the impression that the attorney for the will contestants declined to call additional witnesses because he believed Judge Child had pre-judged the case (Tr. at 109; but see Tr. at 130). It appears that any such impression way have been based at least in part on a statement Judge Child made that Stump's testimony had not hurt the devisees' case (Tr. at 106).

The Board agrees that Judge Child made several inappropriate remarks during the course of the hearing. However, the statement concerning Stump's testimony was, in essence, an evaluation of that testimony. Although Judge Child should perhaps have refrained from commenting on the testimony during the course of the hearing, the Board cannot conclude that this statement, or any other remark Judge Child made, showed that he had pre-judged the case.

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fn. 6 (continued)
particular tapes have lost whatever probative value they might otherwise have had.

Appellants' "newly discovered" evidence argument alleges that decedent was unduly influenced in the execution of his will by Bitt and Vallely. The Board notes that the actual scenario appellants depict is that, throughout the will execution sessions, decedent was protesting and/or expressing confusion about what was happening, but that Bitt and Vallely lied to the will scrivener about what decedent was saying. This is not undue influence, but rather posits a conspiracy between Bitt and Vallely under which they actively misrepresented decedent's statements to the will scrivener. Appellants allege that Bitt and Darcey Martin's mother are close friends. Assuming arguendo this relationship existed and was sufficient to raise suspicions about Bitt, appellants have presented no evidence showing why Vallely--an otherwise disinterested person whom the will scrivener personally selected to witness a will which he anticipated would be challenged--would conspire with Bitt for the advantage of either of the devisees.

Furthermore, regardless of whether or not Judge Child was biased in favor of the devisees, he specifically gave the will contestants the opportunity to present all of the witnesses they had planned to call (Tr. at 110, 113, 114, 128). The attorney for the will contestants stated that the testimony of his additional witnesses would have been cumulative of that given by Stump (Tr. at 114, 130). It appears most likely that counsel determined, based upon Judge Child's comments concerning Stump's testimony, that the testimony of his additional witnesses would not be persuasive.

The actions--or inactions--of counsel for the will contestants in not calling additional witnesses and not requesting either a continuance of the hearing based on the production of the tapes of the will execution sessions or a transcript of those tapes are the basis for appellants' allegations that the attorney was incompetent. However, counsel's actions do not necessarily lead to the conclusion that he was not competent. A decision not to call additional witnesses is also consistent with the exercise of an attorney's legal judgment as to the best way in which to present a case and the potential value of evidence, especially in light of Judge Child's comments concerning Stump's testimony. In addition, counsel's decisions relating to the contents of the tapes of the will execution sessions were based totally on input from his clients, who spoke Shoshone, and who, as found supra, were given an unrestricted opportunity to listen to the tapes. Appellants should have informed their attorney if there was anything on the tapes that warranted further examination.

Assuming that incompetent representation would be a basis for ordering rehearing, the Board finds nothing in the record which convinces it that counsel for the will contestants was incompetent.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Sweitzer's March 9, 1994, order denying rehearing is affirmed. 7/

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Kathryn A. Lynn
Chief Administrative Judge

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Anita Vogt
Administrative Judge

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7/ The Board notes that the disapproval of decedent's 1990 will would not have automatically resulted in appellants' sharing in his estate, as they seem to assume. Instead, the issue would be whether his 1974 will should be approved. If the 1974 will was approved, it appears that Neaman would be the only one of the appellants who would take any of decedent's estate. Tindore's share of decedent's estate might even be increased. The remaining appellants could share in decedent's estate only if decedent's 1974 will, and any earlier wills he might have executed, were disapproved, so that his estate would pass by intestate succession.